Supreme Court, U.S.
FILED
MAY 1 2003
OFFICE OF THE CLERK

No. 132, Original

In the
Supreme Court of the United States

STATE OF ALABAMA, STATE OF FLORIDA,
STATE OF TENNESSEE, COMMONWEALTH OF VIRGINIA,
AND THE SOUTHEAST INTERSTATE LOW-LEVEL
RADIOACTIVE WASTE MANAGEMENT COMMISSION,
Plaintiffs,

v.

STATE OF NORTH CAROLINA,
Defendant.

On Motion For Leave To File Bill Of Complaint

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL 1

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Entergy Arkansas, Inc. v. Nebraska,
226 F. Supp. 2d 1047 (2002) 8

Kansas v. Colorado, 533 U.S. 1 (2001) 6,7

Maryland v. Louisiana, 451 U.S. 725 (1981) 2

Texas v. New Mexico, 462 U.S. 554 (1983) 3,4

Wyoming v. Oklahoma, 502 U.S. 437 (1992) 7

SUPPLEMENTAL BRIEF OF THE STATE OF NORTH CAROLINA IN RESPONSE TO THE BRIEF OF THE SOLICITOR GENERAL

The prior effort of the Southeast Interstate Low-Level Radioactive Waste Management Commission (the Commission) to invoke this Court's original jurisdiction in an attempt to enforce a monetary sanction against the State of North Carolina was rejected (Docket No. 131, Original). Now, the Solicitor General, in a reversal of position, advocates the use of the Court's original jurisdiction to allow four of the Commission's six member States, in conjunction with the Commission–a separate and independent legal entity–to pursue enforcement of a monetary claim on behalf of the Commission against the State of North Carolina, under the guise of an action to declare rights arising from an interstate compact. Extending this Court's original jurisdiction to include actions brought by a State for the benefit of a compact commission does not comport with established precepts limiting the exercise of original jurisdiction to cases that implicate important concerns of federalism and those involving the core sovereign interests of two or more States. The Solicitor General's view that the Court should accept the case under its original jurisdiction fails to suggest more than a minimal presence of legal or policy issues affecting the United States or the sovereign interests of the States. Acceptance of the case would therefore be inconsistent with Chief Justice Rehnquist's prudent suggestion that the Court restrict its acceptance of suits between States to those involving issues of state sovereignty: "Our original jurisdiction should not be trivialized and open to run-of-the-mill claims simply because they are brought by a State, but

rather should be limited to complaints by States *qua* States." *Maryland v. Louisiana*, 451 U.S. 725, 766 (1981) (Rehnquist, J. (now C.J.), dissenting).

Contrary to the Solicitor General's view, the Commission's claim for restitution does not implicate the direct interests of the member States. As detailed in the Brief in Opposition, the petitioners readily admit that the money at issue was raised exclusively by levying fees and surcharges on wastes disposed at the regional facility in Barnwell, South Carolina. The funds collected from nuclear waste generators and distributed to North Carolina by the Commission were never public funds of the treasuries of the party States to the Compact. Indeed, as noted by the Solicitor General in the brief filed in the prior action (which sought the identical relief requested in the refiled action):

> The Commission is not suing North Carolina to recoup funds that are owed to the other party States. Indeed, the Commission–and not the States that are parties to the Compact–dispersed the funds to North Carolina in the first place.

Brief for the United States as *Amicus Curiae* (No. 131, Original) (Pet. App. at 20a). In fact, the critical "disconnect" between the member States to the Compact and the relief being sought was trumpeted by the Commission as a reason for allowing it to proceed directly against North Carolina in the prior action:

> Although any of the member States could seek a declaratory judgment from this Court that North Carolina violated the terms of the Compact, only the Commission itself can sue to enforce the sanction against North Carolina, and collect the $90 million (plus interest) that is owed to it.

Supplemental Brief in Response to the Brief of the Solicitor General (No. 131, Original) at 5-6. The Commission further conceded that no member "State would incur the substantial expense of bringing a lawsuit seeking a declaration that North Carolina violated the Compact when there is no significant monetary recovery available to that State from this Court." *Id.* at 7-8. In spite of these admissions in the Commission's prior unsuccessful attempt to invoke this Court's original jurisdiction, the Solicitor General's view has now changed and accepts the petitioners' assertion that the States' indirect interest in the Commission's monetary sanction is an appropriate basis for the exercise of this Court's original jurisdiction, solely as a result of the Commission's addition of four States as plaintiffs.

1. The Solicitor General's suggested expansion of the concept of original jurisdiction is not supported by citation to *Texas v. New Mexico*, 462 U.S. 554, 567 (1983), for the general proposition that such jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." That case arose from the report of a Special Master concerning water rights under the terms of the Pecos River Compact wherein the State of New Mexico contended

"that this Court may do nothing more than review official actions of the Pecos River Commission, on the deferential model of judicial review of administrative action by a federal agency." 462 U.S. at 566. The Court rejected New Mexico's contention, finding "no doubt" that its jurisdiction "extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows." 462 U.S. at 567.

In proper context, the language explicitly relied upon in two places in the Brief of the Solicitor General does not support the advocated expansion of the scope of cases appropriately within the Court's original jurisdiction. The Court was plainly addressing whether it *could* consider the exception by Texas to the report of the Special Master as a jurisdictional matter in light of New Mexico's claim that the terms of the Pecos River Compact precluded such review. This holding has no application to the circumstances presented when member States seek to pursue enforcement of a monetary sanction order on behalf of a compact commission. Indeed, the relief sought in the Bill of Complaint proposed to be brought before the Court–enforcement of monetary sanctions imposed by the Commission–is tantamount to judicial review and approval of an administrative agency's actions. The Court rejected as "untenable" New Mexico's contention that it undertake judicial review of decisions actually made by the compact commission, finding "[t]hat is not the proper function of our original jurisdiction to decide controversies between two States." 462 U.S. at 570.

2. The Solicitor General declares that "the moving States are entitled to pursue any available compact remedy for North Carolina's alleged breach," and denies that the requested enforcement of the sanctions order is equivalent to an action seeking recovery for an individual entity that is the real party in interest because "[t]he moving States seek relief that would redound to their own benefit under the Compact." Brief for the United States as *Amicus Curiae* at 11. However, the Solicitor General disregards the fundamental fact that the proposed Bill of Complaint explicitly seeks enforcement of a sanctions order that would require the State of North Carolina to pay millions of dollars to the Commission, not to the States.

If, as argued by the Solicitor General, the petitioning States are asserting their own rights under the Compact because they were individually harmed by North Carolina's failure to license and operate a regional waste facility, any such harm would not equate to the sum total of the funds provided by the Commission to North Carolina during the siting process. Rather, any damages incurred by the four named plaintiff States would require calculation of the negative impact on each State's treasury resulting from North Carolina's inability to complete the facility. The remedy sought to be enforced in the proposed Bill of Complaint, however, is measured solely on the basis of the claimed damage to the Commission from the alleged breach of the Compact agreement and in no way relates to the impact of such alleged breach on the member States, either individually or collectively. Enforcement of the monetary sanction imposed by the Commission therefore does not address the asserted harm to the individual States but

instead relates directly to restitution and lost revenue claims which are solely those of the Commission.

The Solicitor General's contention that the presence of the Commission as a non-state party does not deprive the Court of jurisdiction, Brief for the United States as *Amicus Curiae* at 12, may literally be true, but misses the point. This is not a case in which a non-state party is allowed to participate in an original jurisdiction action as an intervenor or an *amicus curiae*. Instead, the relief requested for the asserted breach of the interstate compact directly enures to the benefit of the non-state party. Fundamentally, the cause of action is being advocated on behalf of the Commission, and any monetary damages collected will be paid to the non-state party. The addition of four States as named plaintiffs does not alter these facts and does not support the Solicitor General's change of position.

3. In arguing that the proposed Bill of Complaint involves a sovereign claim of substantial importance, the Solicitor General suggests that the magnitude of the amount of money at issue "present[s] a matter of sufficient gravity among the compacting States to justify this Court's exercise of its original jurisdiction." Brief for the United States as *Amicus Curiae* at 14. The only support offered for this unique assertion is a mistaken reference to *Kansas v. Colorado*, 533 U.S. 1 (2001), where the Court recognized the "importance" of the Special Master's recommendation that prejudgment interest be included in the calculation of final damages resulting from Colorado's violations of the Arkansas River Compact. 533 U.S. at 9 n. 2. The citation offered by the Solicitor General has

no bearing on the jurisdictional issues raised by the claim of the plaintiffs. In fact, the Court had already concluded that it had proper original jurisdiction to enforce the interstate water compact by means of a recovery of money damages. Jurisdiction was appropriate because Kansas was not merely seeking recovery for the benefit of individuals who were the real parties in interest where Kansas had been in full control of the litigation since its inception and "[i]ts right to control the disposition of any recovery of damages is entirely unencumbered." 533 U.S. at 8. Here, the Commission, and not the States, has been in control of the litigation since its inception and the monetary damage recovery is explicitly sought to be paid to the Commission rather than the four States now named as additional plaintiffs. We are aware of no case in which this Court has affirmed the Solicitor General's suggestion that the amount of damages claimed can, standing alone, justify exercise of the Court's original jurisdiction. The Court's contemporary application of jurisdictional principles governing its exercise of original jurisdiction instead suggests that substantial consideration is likely to be given only to cases which "implicate[] serious and important concerns of federalism." *Wyoming v. Oklahoma*, 502 U.S. 437, 451 (1992).

4. To counter the availability of other forums to hear the Commission's case, the Solicitor General again reverses position and adopts the view that "[t]his Court, through the exercise of its original jurisdiction, presents the only realistic forum for adjudication" of the dispute at issue. Brief for the United States as *Amicus Curiae* at 14. The Solicitor General asserts this position while at the same time acknowledging the statement in the prior Brief for the United States that "state

courts *are* appropriate fora for resolving interstate compact controversies that do not fall within this Court's exclusive original jurisdiction." (Pet. App. at 21a-22a) The only attempt to distinguish these conflicting positions is the bare assertion that the repackaged action, with four States added as parties, "falls squarely within the Court's exclusive original jurisdiction." Brief for the United States as *Amicus Curiae* at 15. The addition of four States as plaintiffs does not diminish the availability of other forums to hear this case, and this procedural maneuver should not be accepted as a prototype for establishing the jurisdictional "square fit" suggested by the Solicitor General in future cases where alternative forums are readily available.

The circular reasoning offered by the Solicitor General is also undercut by the extensive ongoing litigation involving the Central Interstate Low-Level Radioactive Waste Compact Commission and the State of Nebraska over the proposed host state's failure to license and open a regional waste facility pursuant to the Central Interstate Compact. *See Entergy Arkansas, Inc. v. Nebraska*, 226 F. Supp. 2d 1047 (2002). The *Nebraska* case, in which the trial court awarded over $151 million to the compact commission, plainly demonstrates that a judicial forum other than this Court can adjudicate claims against a State arising from an interstate compact. Neither the forum in which the matter was tried nor the magnitude of the dollars at issue has precluded the compact commission from pursuing a judicial remedy in that case.

5. The Solicitor General urges the Court to grant the motion for leave to file a complaint and further suggests that

the Court may wish to require the parties to file cross-motions for partial summary judgment limited to two questions pertaining to the authority of the Commission to impose monetary sanctions and the enforcement of such sanctions against a State that has withdrawn from the Compact before such sanctions were imposed. With all due respect, North Carolina's legal strategy in this dispute should not be directed or restricted by the Solicitor General.

While the Solicitor General is no doubt motivated by appropriate concerns for the efficient administration of justice, the suggestion simplistically narrows the matters in dispute and ignores fundamental threshold issues that necessarily would be presented by North Carolina's Answer to the proposed Bill of Complaint. North Carolina's legal defenses to the proposed complaint and the relief requested therein would not necessarily be limited to the narrow issues drafted by the Solicitor General. Although a ruling that the monetary sanctions are not authorized by the terms of the Compact would obviously dispose of the need for further proceedings in the case, this Court should not be misled into thinking that any other answer to the questions framed by the Solicitor General would obviate the need for the development of a record establishing the extensive factual background underlying this dispute and the resolution of numerous legal issues related to North Carolina's defenses to the Commission's claims.

CONCLUSION

For the foregoing reasons, together with those stated in the Brief in Opposition, the Court should deny the motion for leave to file a Bill of Complaint.

Respectfully submitted,

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